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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-940

THE COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

No. 74-949

MARY AKIN, ET. AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR THE PETITIONERS

SUMMARY OF REPLY ARGUMENT

In opposing certiorari the United States said that whether this case should be in a federal or state court concerns ". . . nothing more or less than a choice of forum question" (Br. in Opp. 5), noting that since federal and Indian reserved rights are involved the federal court was the more "appropriate" or "desirable" forum (Br. in Opp. 10, 11). In its brief on the merits, however, the government tells us that there really is no choice—that because the United States included claims for reserved rights for two Indian reservations along with all of its other claims for appropriative and reserved rights for many other purposes, the case may be heard *only* in a federal court.

On this view, of course, the question of the appropriateness of invoking the principles of abstention and comity, upon which the courts below decided the case and which was the issue we presented to this Court on certiorari, is really not here.

This anomaly should be rejected. As we noted in our reply memorandum (at 3) to the brief in opposition, "There is nothing in either of the decisions below holding that such claims must be adjudicated in the federal courts." Indeed, the government told the court below that whether the state court had the requisite jurisdiction was not directly involved in this case and accordingly resolution of this issue was not necessary and should not be made.[1]

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[1] The Government's brief to the Tenth Circuit states (at p. 16):

> The question of whether state courts under Section 666 possess the requisite jurisdiction to join the United States as defendant in stream adjudication actions, where the reserved water rights involved are held by the United States as trustee for Indian tribes, is not directly involved. *One of the reasons for the district court's abstention and dismissal was its belief that the state courts had the requisite jurisdiction. Resolution of this issue is not necessary here and should not be made in a dispute, such as this, where it is not directly involved.* We believe, however, that state courts do not possess the jurisdiction to join the United States in stream adjudication actions to adjudicate reserved water rights which the United States holds in trust for Indian tribes. (Emphasis supplied).

While both courts below agreed that *Eagle County*, 401 U.S. 520 and *Water Division 5*, 401 U.S. 527, did not require exclusive jurisdiction in state courts, neither the district court nor the circuit doubted that there was state court jurisdiction. Indeed, the district court affirmatively held (Pet. App. 20a):[2]

> . . . we are of the view the state forum can fully and adequately adjudicate the issues in this litigation, be they the national forests, the Indian tribes or any other individual litigants. . . .

and the circuit, without demurring to this holding, said (Pet. App. 9a):

> [The McCarran Amendment, 43 U.S.C. 666] permits, but does not necessarily require, the United States being subjected to state jurisdiction.

Where the courts below disagreed—and the reason we sought review here—was in the application of the principles of abstention and comity to permit the ongoing state proceeding in Water Division 7 (where claims to the same water were already pending under Colorado's 1969 Act) to consider the whole community of claims, including *all* claims of the United States, as this Court held appropriate in *Eagle County* and

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[2] As in our initial brief, Pet. App. references herein are to the appendix in the petition in No. 74-940 unless otherwise noted.

Water Division 5. We believe that the district court's consequent invocation of abstention and comity should not have been reversed; and we further believe that at least in the circumstances of this case, once becoming a party to the Water Division 7 proceedings through service under McCarran (43 U.S.C. 666) and submitting *some* of its claims, the United States should have filed *all* of its claims, as McCarran plainly intends.[3]

The protracted brief of the United States is occasioned by belaboring at least two non-issues. The first of these is the government's suggestion that abstention in water rights cases amounts to repeal of federal court jurisdiction (Br. 12). The doctrines of abstention and comity as applied in the circumstances here can hardly be characterized as a repeal of jurisdiction, any more than their invocation in any other case, and we make no claim for this result. In this connection we think the government misreads the application of these doctrines and will treat this briefly in I below.

Secondly, the government repeatedly reargues throughout its brief the legislative history of the McCarran Amendment and the issues already decided

[3] § 666(a)

. . . The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

thereunder by this Court in *Eagle County* and *Water Division 5,* including the proposition that Congress in 43 U.S.C. 666 provided for the adjudication in state courts of U.S. claims to reserved water rights. This Court was faced in those cases, as it is here, with protestations of possible unfair treatment by state courts as well as by assertions of superior expertise in the federal tribunal over the state water judges (Br. 18, 45). All this has already been quite appropriately brushed aside by this Court in its recognition that these suits involve "the whole community of claims," and thus that the United States should be joined (as proclaimed in the Senate report and set forth in *Eagle County* at 525):

> ". . . in a suit wherein its is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value."

The three year legislative history of the McCarran Amendment was covered in detail in the briefs in *Eagle County and Water Division 5.*[4] The reason, of course, was that those cases posed identical questions of jurisdiction under that statute and thus this Court was faced with deciding McCarran's reach. The government asked this Court both in seeking certiorari to the

[4] The major exposition is found in the *Eagle County* Brief for the Respondents and Intervenors, No. 87, O.T. 1970, pp. 6-7, 11-29, Exhibits 1-6. See also *Water Division 5,* Brief of Respondent Court and Colorado River Water Conservation District, No. 812, O.T. 1970, pp. 14-17 and fn. 14, 17.

Suprm Court of Colorado and in briefing the merits in both cases:[5]

> Whether in enacting 43 U.S.C. 666 Congress intended to consent to suits against the United States in State courts for adjudication of its reserved water rights not predicated on State law.

Even though we were respondents we strongly supported the grant of certiorari in both cases because of the importance of an early definitive construction of the reach of the statute to the orderly adjudication and administration of claims to the use of water,[6] similarly asking this Court in both cases:[7]

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[5] U.S. Petition, No. 1178, O.T. 1969, p. 2 and Brief for the U.S., No. 87, O.T. 1970, p. 2 (*Eagle County*); and U.S. Petition, No. 812, O.T. 1970, p. 2 and Brief for the U.S., No. 812, O.T. 1970, p. 2 (*Water Division 5*).

[6] Brief of Respondent Court and Colorado River Water Conservation District in Support of Certiorari, No. 1178, O.T. 1969, p. 5 (*Eagle County*); Memorandum of Respondent Court and Colorado River Water Conservation District in Response to U.S. Petition, No. 812, O.T. 1970, p. 1 (*Water Division 5.*) Our support of granting certiorari also noted (*Eagle County* filing, p. 5)

> It might be argued that decision in this controversy should be withheld until the United States has actually specified all of its claims, including those claimed as reserved rights, and the Colorado court has decided the amounts and the priority dates for each in the context of all of the other claims put forth. *But the jurisdictional question would apparently remain at the threshold of any later effort in this Court. It should be decided now, before further precious time has been lost and considerable further expense has been entailed.* (Emphasis supplied).

[7] Brief for Respondents and Intervenors, No. 87, O.T. 1970, p. 2 (*Eagle County*); Brief of Respondent Court and the Colorado River Water Conservation District, No. 812, O.T. 1970, p. 5 (*Water Division 5*).

> Whether upon joinder of the United States pursuant to 43 U.S.C. 666 the United States must present all of the water rights it owns or claims, including those it may claim as reserved rights, for adjudication with the claims of others.

This Court responded unequivocally and affirmatively in both cases, holding McCarran to be an "all-inclusive statute" covering all claims of the United States "without exception." Accordingly, the question about claimed reserved rights in a state forum, including those claimed on behalf of Indians, has already been decided and is res judicata.

While the government's effort at reargument must thus be rejected, we will revisit some of the legislative history of McCarran in II below to show that claims of the United States on behalf of Indians were clearly intended by Congress to be within the scope of that statute. Further, we will show that both the United States and their amici understood this and clearly affirmed by this post-*Eagle County* and *Water Division 5* actions and statements. If they really feel it necessary they should continue to complain to the Congress, not here.

I.

THE DISTRICT COURT'S DEFERRAL TO THE ONGOING STATE PROCEEDINGS REFLECTS A PRACTICAL JUDGMENT IN THE BEST TRADITIONS OF COMITY AND ABSTENTION.

The government repeatedly mischaracterizes the objectives of the district court and the petitioners in this action. The contention that we have attempted to "oust federal jurisdiction" (Br. 38) by "forcing" the United States to litigate in state court (Br. 33)[8] does

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[8] See also U.S. Br. pp. 12, 15, 21-22, 43.

not address the true objectives set down by this Court in fashioning the principles of comity and abstention. The question here is identical to the question stated in *Burford* v. *Sun Oil,* 319 U.S. 315, 318 (1943):

> . . . While many other questions are argued we find it necessary to decide only one: Assuming that the federal district court had jurisdiction should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?

In determining that abstention was justified in *Burford,* the Court supplemented the application of the doctrine as outlined in *Railroad Comm. of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941) to recognize that state courts should be permitted the opportunity to adjudicate important issues of local policy. As in this Court's later decision in *Alabama Public Service Comm.* v. *Southern Railway Co.,* 341 U.S. 341 (1951) *Burford's* application of abstention was based largely on comity, or non-interference with a state's internal affairs. The government misreads *Burford* in contending that "unsettled issues of state law" are required for abstention. The "difficult state questions" there, as here:

> . . . so clearly involve basic problems of [state] policy that equitable discretion should be exercised to give the [state] courts the first opportunity to consider them. . . .[9]

The government in effect argues (Br. 36) that the mere fact that it was the United States that brought

[9] 319 U.S. at 332. The government oversimplifies in contending "there is no uncertainty in the basic state law" (Br. 35). Both the application and the administration of Colorado's Water Rights Determination and the Administration Act of 1969 are of fundamental importance and are not simple undertakings.

this action in federal court asserting federal claims among others, precludes the invocation of the district judge's discretionary powers to defer to an ongoing state proceeding. But this Court made it clear in *Eagle County* and *Water Division 5* that state courts could properly determine all federal claims to water with this Court available should any collision on those rights require review. Thus, the assertion of claims to water rights by the United States cannot alone be considered sufficient grounds to require a federal forum. Instead, it is only one factor to be considered by the district court in deciding whether to defer to the state forum. This applies as well to the government's contention that a federal court must exercise its jurisdiction if the plaintiff has chosen to bring the suit there, citing *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964) (Br. 35). That case not only involved federal constitutional claims, which we do not have here, but was also qualified as "not involving the possibility of unwarranted disruption of a state administrative process" (*id.* at 415, fn. 5).

The government's attempt to place added weight on the importance of the United States' position as plaintiff, by reference to the American Law Institute's *Study of the Division of Jurisdiction Between State and Federal Courts* (Br. 36), must be counterbalanced by the statement elsewhere in that same study concluding that the federal court should stay its hand in:

> . . . actions challenging state administrative orders regarding the conservation, production, or use of minerals, water, or other like natural resources of the state. The strong state interest in these natural resources, the complex regulatory systems

> commonly provided for them by the states, and the perplexities, both geological and economic, that controversies as to such resources present all argue in favor of leaving their resolution to the states, with ultimate review in the Supreme Court of the United States. (Commentary on § 1371, p. 287-88).[10]

The government's dependence on *Leiter Minerals, Inc.* v. *U.S.*, 352 U.S. 220 (1957) (Br. 37-38) is also misplaced. There an important element in the balance between courts was the fact that all the parties to the suit were joined in the federal action, while the United States was not a party to the state suit (*id.* at 226-227). Just the opposite circumstances exist here. Indeed, while claiming that it has achieved McCarran's purpose to determine all rights to the use of water in one proceeding by instituting suit, the government contradicts itself by noting that its suit is not a general adjudication but seeks only to establish the rights of the United States (Br. 21, fn. 14).

The government's use of *Pacific Live Stock* v. *Oregon Water Board*, 241 U.S. 440 (1916) to support its argument is, at best, misleading. In context, even the sentence partially quoted (Br. 40) is contrary to the government's position. The full sentence and context follow (241 U.S. at 447):

> The rule that where the same matter is brought before courts of concurrent jurisdiction, the one first obtaining jurisdiction will retain it until the controversy is determined, to the entire exclusion

[10] This of course was precisely the way the matter was treated by this Court in *Eagle County* and *Water Division 5*, even though arising in jurisdictional terms and not by way of stay and abstention or comity. It was also precisely the result reached by the district court below.

> of the other, and will maintain and protect its jurisdiction by an appropriate injunction, *is confined in its operation to instances where both suits are substantially the same;* that is to say, where there is identity in the interests represented, in the rights asserted, and in the purposes sought. . . . *This is not such an instance.* (Emphasis supplied)

On facts remarkably similar to those presently before the Court, the two suits in *Pacific Live Stock* were found sufficiently divergent to avoid the so-called "priority" rule and to allow the all-inclusive state adjudication to engulf the limited proceeding in federal court. As above noted, this same divergence, on the government's own admission, pertains here.

The government and its amici overlook the fact that without a unified system of adjudication and administration of water rights within a state, which includes all rights, however derived, the very claims they seek to protect are in doubt and the determination of these rights together with all others, which the McCarran Amendment sought to achieve, is lost. There are continual and innumerable questions arising within the state water courts of Colorado concerning the use of water, most of which never involve use of waters on reservations of the United States, be they Indian or non-Indian. The variety of these questions and their complexity are well known to this Court from its recent review of Colorado law in *Eagle County* and *Water Division 5*, and in recognition thereof the district court very wisely abstained.

In *Eagle County* Mr. Justice Douglas made specific reference to the Court's discussion of reserved rights in *Arizona* v. *California*, noting that while there the Court was "primarily concerned with Indian reserva-

tions" there were other "federal enclave[s]" (401 U.S. at 523) involved for which specific claims were made, including a national forest, a national recreation area, and two national wildlife refuges (*Arizona* v. *California,* 373 U.S. at 601).[11] The diversity of the "federal enclave" was further illustrated in *Water Division 5* when the Court noted (401 U.S. at 528-29):

> The area covered by this suit covers vastly more extensive water rights than those involved in the *Eagle County* case. The Forest Service administers four separate national forests in the area: the White River, Arapaho, Routt, and Grand Mesa-Uncompahgre. The Department of the Interior, through the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of Sport Fisheries and Wildlife, make use of water in Water Division No. 5 for national recreational and other purposes. The Department of the Navy administers certain naval petroleum and oil shale reserves which, if ever developed, would require water to accomplish the federal purpose for which the reservations were made.

Despite the variety of the reservations and their purposes this Court had no doubt that they fell within the scope of McCarran as covered in *Eagle County*

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[11] It may be recalled that Special Master Simon Rifkind declined to reach the same kinds of claims by the U.S. in *Arizona* v. *California,* affecting tributaries, made for the benefit of Indian reservations, national forests, parks, recreation areas, memorials, monuments and lands administered by the Bureau of Land Management (Special Master's Report, filed with the Court December 5, 1960, p. 324). He found "such purely local claims" (*id.* at 332) involved "matters of intrastate rights and priorities" (*id.* at 334) and "myriad individual users" (*id.* at 255) which should not be adjudicated in that suit.

(401 U.S. at 529) and went on to say that the *Water Division 5* proceeding (401 U.S. at 529):

> . . . like the one in the *Eagle County* case reaches *all claims,* perhaps month by month but inclusively in the totality; and, as we said in the other case, if there is a collision between prior adjudicated rights and reserved rights of the United States, the federal question can be preserved in the state decision and brought here for review. (Emphasis supplied.)

There is no question here about the existence of like "federal enclaves" within the area of Water Division 7 or claims to the use of water for those enclaves. What is involved here is the extent and influence of those claims and rights on the rights and claims of over 1,000 other named claimants, and unnamed others. The priority thereof and the quantity in relation to all others can be established most economically, expeditiously, and certainly by the Colorado water court, under Colorado's 1969 Act which provides for notice to all claimants and a resulting decree which will be effective for all claimants, as distinguished from the suit instituted by the United States in the Denver district court, which the United States concedes is one only to establish its rights and not a general adjudication (Br. 21, fn. 14). This concession is totally out of joint with the simultaneous discussion of what the United States calls the limited purpose of McCarran (Br. 21):

> . . . to assure that the sovereign immunity of the United States could not be asserted to prevent a complete determination of *all rights* to use a stream in the process of general adjudication prevailing in many states (citing *Eagle County* and *Water Division 5;* emphasis supplied).

which the United States further recognizes was articulated by the court below as intended "to prevent frustration of the parties because of inability to obtain jurisdiction over the United States" (Pet. App. 7a). This concession also exposes as specious the assertion of the government that when it sues as a plaintiff the purpose of McCarran is satisfied. If McCarran stands for anything, it stands for a general adjudication, not for the single-minded determination of federal claims. This Court's pronouncements in that regard are clear, from *Dugan* v. *Rank*, 372 U.S. 609 (1963) to *Eagle County* and *Water Division 5*.

In sum, the reversal by the circuit was wrong. The district court properly considered and weighed the many special circumstances involved here, in light of this court's instructions in *Burford,* in deferring ". . . for a totality of the reasons expressed under the doctrine of abstention or by comity" (Pet. App. 20a), to the ongoing proceedings before the Water Division 7 court.

II

CLAIMS TO RESERVED RIGHTS ON BEHALF OF INDIAN RESERVATIONS WERE INTENDED TO BE WITHIN McCARRAN AND CONGRESS HAS TAKEN NO ACTION TO CHANGE THIS.

The government tells the Court that if the Court disagrees with its contentions that the district court has jurisdiction (which is not in dispute) and that the doctrines of abstention and comity are inapplicable (which we do dispute), then the Court must decide whether McCarran included state court jurisdiction of claims of the United States to water on behalf of Indians.

As we have already noted, this question was certainly decided in the affirmative by the district court, and we think agreed to by the circuit which construed *Eagle County* and *Water Division 5* as finding that McCarran ". . . authorized a concurrent jurisdiction within state courts to try federal water rights cases—concurrent with the jurisdiction of the federal courts under [U.S.C.] § 1345, . . ." (Pet. App. 8a). This certainly has to include federal Indian claims.

The United States did not seek certiorari in this case, nor did we on this question. Nor need the Court exhume this matter for direct treatment here because the case can and should go off on the wisdom of the district judge in deferring to the state proceedings. If, however, the Court wishes to examine this question further we would note the following:

A. McCarran included claims for Indians

The government's brief concedes defensively, and rather unhappily, that both Justice and Interior participated in the course of Congressional consideration of § 666 wherein both Departments made clear that the proposal would cover the government's claims on behalf of Indians.[12] Despite this the government seeks to argue that the history of McCarran does not reflect a purpose to subject Indian rights to suit in the state courts, suggesting that they were mentioned only "briefly" in the hearings by Justice and in Interior's letter (Br. 59). Our briefs to this Court in *Eagle County* and *Water Division 5* detailed events in Congress over the 1949-1952 period resulting in the enactment

[12] See the government's brief on the merits at 23-29, 58-60. Note particularly the citations to the hearings in fn. 18.

of § 666 in order to demonstrate the general proposition that federal claims *of all descriptions* for reserved rights were covered.[13] In an effort to avoid repeating that detail we will note here only in a summary way some of the specificities of that history showing that when the U.S., in opposing enactment, said it would be required ". . . to claim every right it could conceivably have or need . . ." [14] it specifically included claims for Indians:

1. The Assistant Secretary of the Interior under date of December 22, 1950, wrote to the Director of the Bureau of the Budget giving Interior's views on S. 2305, the original bill leading to the McCarran Amendment.[15] While recommending against enactment, the Assistant Secretary thought there were some circumstances covered by the bill in which the relief it would afford litigants might well be warranted. He observed that the interests of the United States in the

[13] Our briefs are cited in full in fn. 4 *supra*.

[14] Taken from a letter to Senator McCarran dated February 27, 1950, from Peyton Ford, Assistant to the Attorney General, on S. 2305, 81st Cong., 1st Sess. introduced on July 21, 1949 by Senator McCarran, "To Authorize Suits Against the United States to adjudicate and administer water rights." This bill was very similar to § 666 as ultimately adopted three years later. The Ford letter advised that the general waiver of immunity of the United States to suits involving water rights was objectionable because:

> . . . It is likely that such a general waiver would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions and the joinder of the United States in many actions, in all of which it would be required *to claim every right which it could conceivably have or need* . . . (Emphasis supplied.)

See Senate Judiciary Committee files on S. 2305, National Archives, 81st Cong., Record Group No. 46.

[15] See same Archives file noted in fn. 14, *supra*.

waters of the river systems were so many and varied that a full enumeration of them could not be made without further careful study but among interests he did point out were:

> . . . those which exist by virtue of the creation of Indian reservations under the doctrine of *United States* v. *Winters* (207 U.S. 564 (1908)) or by virtue of the creation of, for instance, a national park; . . .

With regard to these and other of its water interests, the Secretary said:

> . . . Since the United States can be said, with varying degrees of accuracy, to be the 'owner' of rights of any or all these types, it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation . . .

Nevertheless, the Secretary thought the United States might permit itself to be joined as a party defendant subject to certain qualifications including, significantly for our purposes here:

> (d) the waiver should not extend to rights asserted by the United States for or on behalf of Indians. . . .[16]

2. At Senate hearings on S. 18, April 25, 1951, Mr. William Veeder represented the Solicitor General and

[16] The full range of qualifications by the Secretary follows:

> The qualifications spoken of above which should, I believe, be attached to such a waiver of immunity are these: (a) the waiver should in all instances be limited to an adjudication of those rights of the United States which depend solely upon their having been acquired pursuant to State law and should not extend to those that exist independently of such law; (b) the waiver should not extend to the granting of equitable relief against the United States or to the entering of a judgment for costs against it; (c) the United States should not in any way

the Justice Department as a whole.[17] He discussed with Senator Watkins pending legislation to authorize the joinder of the United States in a prospective suit between Arizona and California over rights to the Colorado River and related this specifically to Senator McCarran's pending bill, S. 18. When asked by Senator Watkins whether the United States had any water rights in the lower Colorado River Basin, Mr. Veeder immediately raised Indian rights, saying (Hearings, pp. 6-7):

> Yes. On Indian rights alone I think there are something like 650,000, I guess higher than that, 1,000,000 acre-feet that they are claiming for Indian rights down there. So we probably could get into court on it. As I say, I hope the proponents of this legislation [S. 18] understand that

be prejudiced in the adjudication by the existence of a prior decree granted in any adjudication to which it was not lawfully made a party; (d) the waiver should not extend to rights asserted by the United States for or on behalf of Indians.

The *only* qualification which was adopted in § 666 was that relating to not assessing costs against the United States. And the right of removal to a federal court which was contained in S. 2305 when these comments were made, was deleted the next year after Justice testimony that two forums should not be provided. The government's brief on this subject (28-31) reflects misunderstanding of the determination of the 82d Congress to enact a law providing for the adjudication of all claims to water in one proceeding. Further, in suggesting that explicit language should have been used to permit removal to state courts from federal courts, the government exhibits a continuing misapprehension, evident in the *Eagle County* and *Water Division 5* proceedings, of the meaning of the second sentence of McCarran as well as the nature of Colorado's 1969 Act in this case.

[17] Hearings on S. 18 before a Subcommittee of the Senate Committee on the Judiciary, 82d Cong., 1st Sess. (1951), p. 2. S. 18 as introduced was identical to S. 2305 of the 81st Congress.

> this in our estimation has sufficient breadth to authorize that litigation.
>
> Certainly there would be the multiplicity of suits. If the United States could be subject to suit by anyone in any court . . . if there is any dispute at all, they can go into any court and the matter is started immediately—whether the United States will be forced to implead 500 other water users is something else—but I know of no stream system of any size at all in which you wouldn't have a general adjudication if we were sued in connection, for instance, with the Forest Service rights. *If we were sued, we would have to prove* our reclamation rights, *our Indian rights,* the Department of Defense rights, and those are becoming increasingly important. (Emphasis supplied.)

Further (at p. 7):

> *Where the United States is a party the United States of necessity must come in and bring in, for instance its forest service rights, its Indian rights, and when that occurs you must have every one in there or the decree will not be effective* or you will be charged with splitting a cause of action or res judicata, one or the other. (Emphasis supplied.)

There then followed discussion of the Colorado River Compact, with Mr. Veeder saying that the Compact (p. 13):

> . . . specifically provides that the largest user on the Colorado, the largest claimant on the Colorado River, is exempt from it—the Indian service, the Indian rights.
>
> Senator WATKINS. All right. They have taken care of whatever the Indians have, and they act in a trust capacity there, not in their own sovereign right, but in a trust capacity for the Indians.

Mr. VEEDER. But the fact remains that there is a million acre-feet of water the United States owns in there. It doesn't matter how it owns it.

Senator WATKINS. Yes, it does. It makes quite a difference how it owns it. That is the point. It owns it as trustee. The beneficiaries are the Indians and they have prior right to the United States.

Mr. VEEDER. In that regard, Senator, the United States holds everything in trust. It holds this building in trust. The point I am trying to make is that when we start talking about the waiver of immunity of the United States to suit involving the right to the use of water, you get into a multitude of questions that are so complex that one piece of legislation could create havoc through the West. . . .

Mr. Veeder went on (p. 14):

> You have a general waiver of immunity *for every water right in the United States.* You not only have a waiver of immunity, you subject us to the administration of every State. (Emphasis supplied.)

Mr. Veeder thought that the day had come when the government must come forward and indicate the maximum amount of rights it was going to assert so that others downstream would know the extent of the rights and could plan accordingly. He said, however, it could not be done absent an inventory which should be awaited, for otherwise, if the immunity of the United States were waived (p. 17):

> . . . there will be no method for the United States to plan, and we will find ourselves doing what we are doing in Nevada. *Some of the rights were not proved up in the Walker River case* and the United States is going to have to go in and condemn rights which at one time it owned. If it doesn't condemn them, it won't have them. That is all there is to it. . . .[18]

Mr. Veeder thought that specific waivers of immunity might be provided in regard to specific streams but not a general waiver as proposed by Senator McCarran's bill. In this connection he was asked a question relating to the Quinn River and to assume several facts, including the acquisition by the Indian Service of certain lands and water rights following a general adjudication, but later refusal by the federal government through its Indian Service to recognize the adjudication while continuing to divert water in violation of the decree and without paying taxes. Mr. Veeder said that in the circumstances and as things then stood (i.e., without a waiver of immunity) there would not be any possibility of a direct proceeding against the United States (p. 18).

3. On August 3, 1951, the hearings were reconvened (Hearings, p. 37). Notices had been sent to the Solicitor General and to Justice as well as to Interior and other agencies. Only a representative of the Department of Agriculture appeared from the agencies. During this hearing session a lengthy statement was submitted in support of S. 18 on behalf of the Attorney General of Nevada (pp. 44-49) making specific reference to the Quinn River case, adjudicated under Nevada law with a decree entered on April 9, 1919 after some 12 years of litigation. Subsequently, the Carson

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[18] Emphasis supplied. This is an apparent reference to *U.S.* v. *Walker River Irrigation District*, 104 F.2d 334 (9th Cir. 1939) where the entitlement to waters of the Walker River Indian Reservation was involved.

Indian Agency of the Bureau of Indian Affairs acquired some of the water rights and lands and some years after that difficulties were encountered in the administration of the rights settled by the 1919 decree. An action was commenced in 1949 in state court, which ordered BIA joined, but this was frustrated by the Justice Department in the U.S. District Court for Nevada in July 1949 where sovereign immunity was successfully claimed. The case went back to state court, without the United States as a party, where there were no further proceedings because of the inability of the court to determine the rights held by the United States on behalf of the Indians. This, the Nevada statement said, created a chaotic condition in the efforts of the state to administer the stream and was a throwback to the conditions which existed before the enactment of state water laws as described by this Court in *Pacific Live Stock* v. *Oregon Water Board,* 241 U.S. 440 (47-48).

4. A further hearing session was held on August 8, 1951 (p. 57). Mr. Veeder again appeared, as Special Assistant Attorney General. In this discussion he made a correction to previous testimony to make it clear that his reference in earlier testimony had been to the *Walker River* case (see fn. 18, *supra*). Senator Watkins urged him to make further corrections and submit further views (p. 64) because:

> . . . This is a very important matter—consenting to the United States being sued in these adjudication suits.
>
> We would like to have the position correctly stated.
>
> We do not want any misapprehensions as to what you claim or what you said.

On the understanding that the report of the Justice Department was on the way to the Committee, Senator Watkins urged that it state fully the government's position and extended the privilege of making a further filing, should this not be the case (pp. 65-66).

5. The report of the Justice Department, dated August 3, 1951, appears immediately following the foregoing (pp. 66-67). Again signed by Peyton Ford, this time in his capacity as Deputy Attorney General, the report appears to be nearly identical with the report almost 18 months earlier (see fn. 12 *supra*), again objecting to a general waiver of immunity because (at p. 67):

> . . . It is likely that such a general waiver would result in the piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions, and the joinder of the United States in many actions in all of which it would be required to claim every right, which it could conceivably have or need . . .

6. The Interior Department report is also set out (pp. 67-68), also dated August 3, 1951, and also nearly identical with the report submitted the previous December to the Bureau of the Budget (see paragraph 1 above). In stating interests of the United States which would be involved this letter again refers to (p. 67):

> . . . those which exist by virtue of the creation of Indian reservations under the doctrine of *United States* v. *Winters* (207 U.S. 564 (1908)) or by virtue of the creation of, for instance, a national park; . . .

and again suggests that waiver would be agreeable subject to a right of removal to federal court and other qualifications including (p. 68):

> . . . (e) the waiver should not extend to rights asserted by the United States for or on behalf of Indians.[19]

7. The Senate Judiciary Committee report, issued September 17, 1951, also contained the full text of both the Justice and Interior reports[20] and observed specifically with regard to them (p. 2):

> The committee has taken note of the reports of the Department of Justice and the Department of the Interior printed below which oppose the legislation, but has concluded, after a consideration of all of the evidence available to the committee, that the legislation is meritorious.

8. S. 18 was called on the Senate Calendar on October 11, 1951, but was not fully considered (94 Cong. Rec. 12947-948 (1951)). As the government notes (Br. pp. 59-60) in the time that was allowed Senator Chavez asked a question about Section 2 of the bill, which was not ultimately enacted, providing for a catalog of U.S. claims at Interior. The Chavez question indicates he thought the Interior catalog was to include *all* claims, not only those of the United States, within which Indian claims might be integrated, but those of individual citizens as well. We think Senator McCarran's "negative" (U.S. Br. 60) response was directed to Senator Chavez's misapprehension that rights of individual citizens would be enrolled at Interior, because he plainly said the government could act as trustee for the Indians. The colloquy was cut off, and there was no further consideration at that time.

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[19] As noted in fn. 16 *supra*, the *only* qualification adopted in § 666 was that against assessing the United States for costs.

[20] S. Rept. No. 755, 82d Cong., 1st Sess. (1951), pp. 7-8.

9. On April 2, 1952, the Senate Judiciary Committee issued a Part 2 to S. Rept. No. 755 to accompany an amendment to S. 18 as previously reported. The amendment simply rearranged the language of Section 1 by placing the proscription against waiver of immunity in original suits in a separate subsection. This was done to make it "extremely clear" that provisions now contained in the second sentence of § 666(a) would be applicable to the first part of the section ". . . which authorizes the joining of the United States as a defendant *in any suit* as to the adjudication of rights to the water."[21] The bill as thus amended was considered on the floor of the Senate on June 21, 1952 and passed without further discussion (98 Cong. Rec. 7817-18 (1952)).

10. At about the same time, in connection with a House bill of similar import, the Director of the Bureau of the Budget, reporting adversely to the Chairman of the House Interior Committee,[22] noted:

> . . . The Secretary of the Interior and the Attorney General recommended against the enactment of similar provisions in a bill, S. 18, recently passed by the Senate. As pointed out by these agencies, enactment of such a law would result in a multiplicity of actions and the joinder of the United States in many actions wherein it would be required to claim every right it could conceivably have or need . . .

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[21] S. Rept. No. 755, Part 2, 82d Cong., 2d Sess. (1952), p. 2 (emphasis supplied). The second sentence of § 666(a) is set forth in fn. 3, *supra*.

[22] Letter report on H.R. 7691, dated June 27, 1952, contained in the National Archives, Water Rights Legislation, 82d Cong., Record Group No. 48, File 8 14. See also H.R. 5735 of the same Congress. These bills are shown in full text as Exhibits 5 and 6 of our brief to the Court in ***Eagle County***, pp. 11e-15e.

11. Meanwhile the House had passed a bill providing appropriations for the Justice Department for fiscal year 1953.[23] Section 208 of this bill, which would have barred the use of any funds by Justice to prosecute suits where there were more than 2,500 defendants, was aimed at stopping the Santa Margarita River case, where the government, in connection with its claims to waters for the Camp Pendleton Marine Base near San Diego, had instituted suit against some 3,200 persons in federal district court.[24] The Justice Department wrote to Senator McCarran as Chairman of the Senate Appropriations Subcommittee which would hear the bill, asking the Committee to "eliminate" Section 208.[25] Philip Perlman, Solicitor General of the United States, appeared at the hearings, together with Mr. Veeder. Their discussion of water rights adjudications was wide-ranging, going beyond the Santa Margarita situation where assertion by the government of a "paramount" right had caused problems. Senator McCarran observed (Hearings, p. 1354):

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[23] H.R. 7289, 82d Cong., 2d Sess. (1952). This bill also provided funds for the State and Commerce Departments and the Judiciary for FY 1973.

[24] This precipitated a bitter controversy. The Appendix to the hearings on S. 18, pp. 69-96 contains materials involving this dispute. See also 98 Cong. Rec. 120-129 (1952) where, in commenting on Santa Margarita, Senator Knowland included the texts of S. 18 and S. Rept. No. 755. Some of the proceedings in the case may be found in *U.S.* v. *Fallbrook Public Utility District*, 101 F. Supp. 298, 108 F. Supp. 72, 109 F. Supp. 28, 110 F. Supp. 767.

[25] See Hearings on H.R. 7289 before the Subcommittee of the Senate Appropriations Committee, 82d Cong., 2d Sess. (1952), p. 1339. The Subcommittee had letters from a number of Senators who thought Section 208 might overreach and who preferred a moratorium on the Santa Margarita case until S. 18 or a similar bill could be enacted (Hearings, pp. 1344-47).

> Senator McCarran. The Government came in on the Truckee and the Carson on the basis that the recreation project there had to have water rights. And they set up the suit, the United States States against the Ora Ditch Co. and others.
>
> And then they brought in the Perla Lake Indian Reservation as having a prior right. Never once during that hearing did they assert this paramount right.
>
> Mr. Perlman. Of course not. We wouldn't anywhere, except that California itself seems to require it under its own decisions.[26]

Just prior to this Senator McCarran asked the Solicitor General why Justice opposed S. 18, indicating he thought S. 18 "along this very line" because it lent itself to the determination of water rights, which was not possible in the West without the government and all the water users on the particular system brought in (Hearings, p. 1349). Mr. Perlman thought the real motivation for opposition was because S. 18 might affect suits between states, which Senator McCarran said was not his intention at all (Hearings, p. 1340).

On the basis of this and other discussions (Hearings 1802-1807) the Committee appeared to favor substituting S. 18 for Section 208 and in the Senate Report on the appropriations bill, issued June 24, 1952, the Committee did just that.[27] Two days later the full Senate approved this action (98 Cong. Rec. 8109-8110) and the bill went to conference.

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[26] "Perla" Lake apparently refers to the Pyramid Lake Indian Reservation. See further references in the Hearings, p. 1807.

[27] S. Rept. No. 1807, 82d Cong., 2d Sess. (1952) on H.R. 7289, p. 10. This substitution was of Sec. 1 of S. 18 only and did not include the cataloging provision contained in Sec. 2 of the bill as reported.

12. The Administration reacted promptly by writing identical letters on H.R. 7289 to the Chairmen of the House and Senate Appropriations Committees to express the deep concern of the President ". . . and his hope that the Conferees will support elimination of Section 208"[28] which now contained the first three subsections of S. 18, as passed by the Senate, and presently found in 43 U.S.C. 666. Among the reasons why this section should be eliminated, it was urged, were:

> Section 208, if it were enacted, would permit the United States to be made a party to every "adjudication of rights to the use of water of a river system or other source" and to every adjudication involving "the administration of such rights" whenever the United States was found to be a necessary party to such suit. When one considers the vast diversity of interests that the United States has in interstate and other river systems, the importance of this provision cannot be overestimated. *National parks, Indian reservations, power installations, military and Atomic Energy establishments, and irrigation projects are only a few of the interests that would be affected.* It can be said with certainty that while these provisions are intended to simplify water law administration their enactment could only result in further confusing the issues. A further complicating factor is the possibility that section 208 could be construed to require the United States to appear in State courts endowed with jurisdiction over water rights litigation. To subject Federal interests to the variety of judicial

[28] See letter of June 28, 1952 from Director of the Bureau of the Budget to the Honorable Clarence Cannon, Chairman, House Appropriations Committee, contained in National Archives, Record Group 48, File 1 59, H.R. 7289, 82d Cong., 2d Sess. (1952).

> jurisdictions existing in many State judicial systems would result in a multiplicity of actions and the joinder of the United States in many actions wherein it would be required to claim every right it could conceivably have or need . . . (Emphasis supplied).

Similar arguments were made on behalf of the Administration when the conference reports were considered on the floor of the House but by a roll call vote of 181-119 (98 Cong. Rec. 9446, July 4, 1952) a motion to strike Sec. 208 was defeated. Although there appears to have been some consideration of a veto,[29] the bill was signed into law by the President on July 10, 1952.

Thus, some 3 years after Senator McCarran first introduced this proposal, what we now know as 43

[29] The same Archives file contains a brief memorandum of analysis of Section 208 furnished to then Interior Secretary Chapman for a White House conference on July 9. That memo, in commenting on the probable wide impact on Interior programs, makes specific note that the United States, through the Bureau of Indian Affairs, holds extensive water rights in trust for Indian tribes and among other possible effects suggests "Section 208 may lend itself to an attempt to upset the water rights reserved to and held in trust for Indian Tribes by the Federal Government."

The file also contains the following telegram of July 1, 1952 from the Association on American Indian Affairs, Inc. in New York City to Senators Saltonstall, Lehman, Humphrey, Douglas, Murray, Chavez, Langer, Case, Kefauver, Aiken, Kilgore, and O'Mahoney; and Representatives Fernandez, Roosevelt, Fine, Flood, Marshall, Morris, Eberharter, and Rooney:

> Believe water rights rider in Section 208 of State-Justice-Commerce Appropriations Bill H.R. 7289 (now in joint Senate-House Conference) undermines federal water rights everywhere, including Indian water rights on reservations, federal water rights connected with federal dams, national parks, rivers, and harbors. Interior Department confirms serious consequences of Section 208. May we appeal for your help in calling for elimination of this dangerous rider?

U.S.C. 666 became law. There can be no question from even this synoptic view of the long and detailed consideration of this measure by the Congress that claims by the United States to water for all purposes, including those for Indian reservations, were fully intended to be within its scope.

B. Eagle County and Water Division 5 embrace all claims of the United States, including those on behalf of Indians.

1. The en banc opinion of the Supreme Court of Colorado in *Eagle County* decided September 15, 1969 (169 Colo. 555), contains many references to claims to water for Indians. That court was faced with the government's contention that McCarran applied only where there was a general adjudication involving the claims of *all* of the water users (at 561). The court went through the Senate Judiciary Committee report in detail as well as other materials in the legislative history and concluded that there was no doubt of McCarran's application (564-67). Specific reference was made to many of the river systems in Colorado, including the San Juan (the subject of the present litigation); to the trepidation of the Justice Department about federal water rights under state jurisdiction (570); and to the nature of reserved rights asserted by the United States under a number of cases in this Court, including those on behalf of Indians under *Arizona* v. *California,* 373 U.S. 546 and *Winters* v. *U.S.,* 207 U.S. 564 (at 573-76). In noting that water rights in Colorado were ". . . of the greatest importance to the welfare and economy" of the people of Colorado, and of considerable importance to the United States, the court observed (579-80):

> . . . of the 66½ million acres of land in Colorado, the United States has 36.4% or about 24⅓ million acres in the form of public domain, national forests, national parks and monuments, military reservations and an Indian reservation.
>
> We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure--and this is equally true from the standpoint of the United States as well as Colorado and its citizenry.

In holding specifically that McCarran was intended to grant jurisdiction over the United States with respect to reserved water rights (at 581) the Colorado Supreme Court pointed directly to the report of the Interior Department of August 3, 1951 and quoted that portion of the letter which included Interior's reference to the water interests of the United States ". . . which exist by virtue of the creation of Indian reservations under the doctrine of *United States* v. *Winters.*" The court concluded (at p. 582):

> . . . We are holding here that *whatever* rights the United States has to water can be recognized and adjudicated by our district courts just as adequately as in any other forum—and perhaps more adequately. Therefore it would seem that no adequate reason exists to withhold reserved rights from the light of day and adjudication. (Emphasis supplied.)

The court refused to go over all this ground again in *Water Division 5.* When the United States sought prohibition the writ was simply denied.

The foregoing makes plain that *Eagle County* and *Water Division 5* came to this Court on the broad question of the scope of consent to suit provisions of McCarran and on the unmistakable holding that *whatever* the claims of the United States, they were subject to definition in the state proceedings.

2. As we noted at the outset, this Court had no doubt that it was addressing itself to the scope of McCarran in *Eagle County* and *Water Division 5*,[30] and found it to be an all-inclusive statute, including appropriative, riparian and reserved rights, with no exceptions.[31] These decisions are of course res judicata as to the government.

Although the government opposed certiorari in the present case, now that the case is here the government tries to use it to relitigate *Eagle County* and *Water Division 5*. It calls the questions involved in federal reserved rights "alien" to the state tribunals, requiring "expert" treatment by federal courts and suggests that going at it the government's way will ease the "burden" on this Court.[32] The government totally ignores that this Court has already twice decided that state tribunals may be used and twice explicitly assumed the "burden" of looking at any federal questions properly reserved by the United States in the state proceedings (401 U.S. at 526, 529-30). Furthermore, the government blandly overlooks the fact that

[30] In *Water Division 5* the Court noted (401 U.S. at 529):

> The major issue—the scope of the consent to be sued provision in 43 U.S.C. § 666—has been covered in the *Eagle County* opinion and need not be repeated here.

[31] *Eagle County*, 401 U.S., at 524.

[32] U.S. Br. pp. 44-45.

since this Court required it to do so in the 1971 opinions, the government has been presenting federal claims for reserved rights in Water Divisions 4, 5 and 6 in Colorado, as well as the fact that the very same questions it now wants the federal district court in Denver to handle, save only the claims relating to Indians, are already pending in state proceedings.

Nevertheless, still relitigating issues already decided, the government tells this Court that it would really be a simple matter to integrate a federal decree. It is no cause for concern, we are told (Br. 49), that two courts will each have the same 1000 and more litigants before them and each will simultaneously be considering water rights questions in the same watershed, because the questions will be different. This not only overlooks precisely what McCarran avoids but fails to consider the fundamental fact, clearly perceived in McCarran, that there may be different questions but only one stream system to satisfy them.

Even the government has to acknowledge that "It is desirable, of course, that administration of any watershed be unified" (Br. 50). It assures us that existing water rights established in previous adjudications should not have to be relitigated but in the same paragraph talks about "investigating" senior claims, and perhaps pursuing them; possible factual hearings by some "special master" of undefined jurisdiction; and the establishment of a water master who "would merely monitor the state administrative system" (Br. 50). All of these chores, if they be there, are already provided for in Colorado's procedures. The government's arguments in this regard are not only strained but repugnant. Certainly the federal district court has

enough to do without reviewing reports from a "monitor [of] the state administrative system."

The government knows all of these matters were before this Court in *Eagle County* and *Water Division 5* but tries to retread them now on the ground that those cases did not specifically include U.S. water claims for Indian lands. This simplistic approach in an effort to extricate all federal claims from state proceedings should be rejected. We make no pretension that there were specific Indian claims in the 1971 cases, just as there were many other types of reservations, or "enclaves" to use the Court's word, which were not specifically before the Court. What was before the Court was a question far greater than any specific claim—it was the scope, the reach, of the consent to suit in 43 U.S.C. 666 and it was found to be all-inclusive of federal claims, without exception.

The United States shows its awareness that all reserved claims, including those on behalf of Indians, had to be involved in *Eagle County* and *Water Division 5*, because at the time of McCarran in 1952 the implied reservation of water doctrine existed only in connection with Indian reservations. Thus the United States concedes that it may "be argued that the only reserved rights Congress could have had in mind in 1952 were those reserved to Indians" (Br. 62, fn. 50).[33]

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[33] The Indian amici, while misspeaking prophetically, worry about this quite evident proposition also, noting that since Indian rights go back to this Court's 1908 decision in *Winters*, and other federal reservations were not beneficiaries of the implied reservation theory until this Court's 1963 decision in *Arizona* v. *California*:

> . . . it would be easy, but not incorrect (sic), to assume that Congress had Indian reserved water rights squarely in mind when the McCarran Amendment was adopted in 1952 . . .

On our part we can concede that at the time of McCarran the United States was at least thinking of reserved rights as being implied to other types of enclaves as well. For example, the Interior Department in twice reporting on Senator McCarran's bill included in the federal interests which would be affected:

> . . . those which exist by virtue of the creation of Indian reservations under the doctrine of *United States* v. *Winters* . . . or by virtue of the creation of, for instance, a national park;

This only makes all the more clear, however, as this Court found in *Eagle County* and *Water Division 5* that federally reserved lands include any federal enclave, whether Indian reservations, national forests, or naval petroleum and oil shale reserves.

Nevertheless the government insists that since no specific claims to reserved rights for Indian lands were here in *Eagle County* and *Water Division 5*, the question of jurisdiction as to them was not reached.[34] This result however cannot be achieved simply by dropping a wishful footnote in one case. This is so particularly when, a in *Eagle County*, the United States sought certiorari on what it claimed a "clearly separable" issue from the merits of the litigation pending in the state court concerning the relative rights and priorities of water claimants. This separable issue was whether:

> . . . the Colorado district court has jurisdiction under a federal statute [43 U.S.C. 666] to adjudi-

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Indians were at most a confused afterthought. (Amici Brief of Native American Rights Fund 17).

[34] See U.S. Br. 60-61. Fn. 49 at p. 61 refers to the footnote in the U.S. *Water Division 5* brief that Indian rights were not involved in that case.

> cate the water rights of the United States, including its reserved rights . . . (Pet. in No. 87 (No. 1178, Oct. Term 1969) at 9).

And in petitioning for certiorari in *Water Division 5* the government said that the *Eagle County* issue of whether 43 U.S.C. 666 extends to suits against the United States for adjudication of its reserved water rights not predicated on state law ". . . was as squarely presented . . . as in *Eagle County* and needs no elaboration here" (Pet. in No. 812, Oct. Term 1970, at 6). To persuade this Court to take these cases the government advised (Pet. in No. 87, No. 1178, O.T. 1969, pp. 10-11 (*Eagle County*)):

> . . . The magnitude of the problem is indicated by the fact that about 443,000,000 acres have been withdrawn from the public domain for use as Indian reservations, national parks, national forests, national recreation areas, national monuments, etc.[7] It is not an exaggeration to suggest that the decision below raises serious questions about the nature and scope of the federal government's water rights on all of these lands. (Footnote omitted.)[35]

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[35] With regard to all of its claims it may be recalled that in seeking a writ of prohibition the United States told the Supreme Court of Colorado if it (A. 14 in No. 87, O.T. 1970):

> . . . were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these proceedings would be removed. While the United States could not, even then, be joined as a defendant under 43 U.S.C. sec. 666, for the reason that an entire river system would not be involved, the United States would be assured it could have its rights properly adjudicated if it chose to appear as plaintiff in a Colorado Water District adjudication . . .

Note no qualification whatsoever was made as to U.S. claims on behalf of Indian lands.

The foregoing were not the only references to claims on behalf of Indian lands in submissions to this Court in *Eagle County* and *Water Division 5*. Amicus curiae briefs were filed on behalf of many states having Indian populations. The brief on behalf of Colorado, Oregon, Nevada, Idaho, Montana and Alaska specifically quoted the portion of the report of the Interior Department which was before the Senate Judiciary Committee advising that among U.S. interests to be affected were those existing by virtue of the creation of Indian reservations under the *Winters* doctrine, concluding that it seemed indisputable "that the purpose of McCarran was to make possible an effective determination of all water rights from a single source of supply." (Br., pp. 21, 22).[36] The amicus brief of the State of Washington not only made it clear that it had joined the government under McCarran in some nine cases but that its courts had been adjudicating claims to reserved rights of the United States (Br. 9-12). Washington noted that in only one case, *In re Chiliwist Creek,* had jurisdiction been contested by the U.S. and attached a copy of a memorandum opinion by the state court showing that the United States owned land in the watershed and was acting as well as trustee for an Indian ward allottee (Br. 15). Indeed, in that case the United States and its ward, T. B. Charley, removed the case to federal district court and there sought to have the case dismissed. That court remanded the case to the state court.[37] The United States did not appeal,

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[36] Among other amici state filings, Arizona's brief raised Indian claims (Br. p. 10, fn. 3), and their quantification in *Arizona* v. *California* was cited in California's filing (Br. 14).

[37] Opinion dated May 29, 1964, (unreported) in No. 2491, U.S. D.C., Eastern Dist., Wash. (ND), Charles L. Powell, J., appended hereto as Exhibit 1. Note this opinion reserved action on the mo-

but submitted claims for itself and on behalf of T. B. Charley, claiming a reserved right, who was accorded the first priority in the state adjudication.[38] Other cases in the Washington state court said to involve claims on behalf of Indian lands include *In re Bonaparte Creek*.[39] Despite these and other instances referred to below, the Indian amici tell this Court (Br., p. 3), clearly erroneously, "All previous adjudications of Indian water rights have taken place in federal forums . . ."

3. Other actions by government and Indian representatives contemporaneous with and since *Eagle County* and *Water Division 5* show full awareness that federal Indian claims were recognized to be within the scope of those cases:

a. After the opinions of the Court in *Eagle County* and *Water Division 5* were announced, the Fort Mojave Tribe of Indians for itself and several tribes similarly situated, filed in both cases what they denomin-

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tion to dismiss to the state court. The state court rejected that motion. No appeal was taken to the Washington Supreme Court. See fn. 38 *infra*.

[38] Portions of the decree in this case (No. 16323, Superior Court in and for Okanogan County, May 16, 1967) are reprinted as Exhibit 2 to this brief showing that the interests of the United States, in addition to those on behalf of its Indian ward, included an appropriative right on behalf of the Forest Service as well as a claimed reserved right for the Okanogan National Forest. The proceedings were appealed on unrelated grounds to the Supreme Court of Washington. See *In re Chiliwist Creek* (M. G. Walker, Supervisor of Water Resources, State of Washington v. Biles-Coleman Lumber Co. et al.), 77 Wash. 2d 658, 466 P. 2d 513 (1970).

[39] Cause No. 17787, Superior Court for Okanogan County, cited in amicus curiae brief for the State of Washington in *Eagle County*, p. 10.

ated a "Motion for Leave to File Suggestion of Interest, Suggestion of Interest and Points and Authorities in Support Thereof." Among other arguments, these filings asserted that waters flowing from Colorado, including the Eagle River, were essential to the implementation of this Court's decree in *Arizona* v. *California* regarding the Fort Mojave Tribe, and they were thus indispensable parties; that Indians would be irreparably damaged if their rights to water would thereafter have to be adjudicated in state courts, as *Eagle County* appeared to require; that this Court was without jurisdiction, that its *Eagle County* and *Water Division 5* opinions should be vacated, and the cases be dismissed. This Court on May 3, 1971, denied leave to file these documents.[40]

b. Commencing on October 19, 1971, and on various dates thereafter up to January 26, 1972, at various places throughout the country, the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee held hearings on "Administrative Practices and Procedures Relating to the Protection of Indian Natural Resources."[41] Though the hear-

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[40] 402 U.S. 940 (1971). The great bulk of these documents consisted of an Appendix B which characterizes the government's footnote in its *Water Division 5* brief that Indian rights were not involved as "cryptic" and "meaningless on its face" (at pp. 74, 75) and concludes that ". . . the record can only safely be read as including Indian rights" (at p. 87, fn. omitted). At p. 55-65 of an appendix to Appendix B, portions of a statement are reprinted, dated September 25, 1970, apparently presented to the Senate Interior Committee which held hearings on that date on S. 4165, to create an Indian Trust Counsel Authority. This statement leaves no room for doubt that the U.S. case as presented in *Eagle County* comprehended claims to all reserved rights, including those for Indians.

[41] Hearings, 92d Cong., 1st Sess. (1971-72), Parts 1-7.

ings related to numerous matters other than water, testimony on that subject indicates both the Justice Department and the Indians construed *Eagle County* and *Water Division 5* as applicable to all reserved rights including those on behalf of Indians.

The attorney representing the Fort Mojave Tribe testified:[42]

> Now in October of 1970 I received a telephone call from William Veeder. He explained to me that there was a case that had come to the U.S. Supreme Court, the *Eagle River* case, . . .
>
> When Mr. Veeder called me, he explained that this case, if it went in favor of the State, would result very clearly in subjecting the sovereign Indian nations who had these attributes of not being sued to suit whether they wanted to or not.

And further (at 32):

> There are at least seven law firms in this country that deal with Indian matters a great deal and they are prominent firms who have all agreed that this is a great blow because it does encompass Indians, . . .

Although the Justice Department repeatedly assured the Subcommittee they felt the footnote in their *Water Division 5* brief clearly put this Court on notice it was not considering claims for the use of water on Indian lands and thus the result in *Eagle County* and

[42] Hearings, *id.* Part 1, October 19, 1971 at Washington, D.C., p. 25. See statements at pp. 29-31 making it clear the view of this witness that under *Eagle County* Indian claims could be adjudicated in state proceedings. For some statements of similar import by others in Part 1 see pp. 31, 41, 99, 121, 138-141, 150, 159. The *Eagle County* and *Water Division 5* decisions of this Court are reprinted in these hearings at pp. 281-85.

Water Division 5 did not really apply in that context [43] they nonetheless suggested as the surest resolution of this problem:[44]

> Again, as stated above with respect to the question whether or not 43 U.S.C. 666 consents to the adjudication of water rights reserved for the benefits of Indians or Indian tribes, the surest resolution of this problem would be legislation making clear that the United States shall have an undisputed right to remove to the United States District Court any suit which purports to join the United States as a defendant under authority of this statute. You may be interested to know that S. 18, the bill which was eventually enacted as 43 U.S.C. 666, as originally introduced, contained such a provision. This provision was eliminated after a witness speaking for this Department objected to it. However, the Department has since changed its views on the question of removing these cases to the Federal district courts.
>
> We suggest that now may be an appropriate time for the Committee on the Judiciary to alleviate some of the problems which have plagued

[43] At the same time, however, Justice asserted reliance upon portions of *Eagle County* and *Water Division 5* in Indian matters, as follows:

> It is definitely the position of the Department of Justice that the rationale of this portion of the opinion [concerning U.S. authority to reserve water for federally reserved lands] is applicable to Indian water rights and this would be asserted by the Department of Justice in any litigation where the United States is acting on behalf of Indians to protect their water rights. We would also consider the portion of the Eagle County opinion to the effect that questions pertaining to reserved water rights, including the volume and scope of particular reserved rights, are Federal questions subject to review by the Supreme Court, to be applicable to Indian water rights.

[44] Hearings Part 1, p. 14. See also Part 2, pp. 443-44, November 30, 1971, at Washington, D.C.

> our lawyers for years in the defense of actions against the Government under this statute and to consider an amendment which would alleviate the problems created in 1951 when the Department's spokesman objected to the removal provision which was then in S. 18.

Despite this exhortation and others made during the hearings that Congress take some action, it has not seen fit so to do.

c. Further hearings on the proposal to create an Indian Trust Counsel Authority were held on November 22-23, 1971.[45] Among references to *Eagle County* was the following statement made by counsel for a number of Indian tribes:

> . . . pursuant to the recent decision of the Supreme Court in the *Eagle River* case, some western states may attempt to force Indian tribes to enter state proceedings allocating water rights. In these situations, pursuant to 43 U.S.C. § 666, the United States will enter on its own behalf. However, the Authority should be permitted to enter on behalf of the Indian tribes in the name of the United States, since the United States holds the tribes' water rights in trust.[46]

d. In March 1974, the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs held hearings on the various social, economical and political aspects of Indian water rights.[47] The

[45] Hearings on S. 2035, before Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 92d Cong., 1st Sess. (1971).

[46] *Id.* at 53. For other mention of *Eagle County* see pp. 79, 103, 122-23, 147, 153.

[47] Hearings captioned "Indian Water Rights", Senate Committee on Interior and Insular Affairs, 93rd Cong. 2d Sess. (1974).

President of the National Tribal Chairman's Association [48] in commenting on studies underway stated:[49]

> We understand that tribes will be able to promulgate water codes and, under authority from the Secretary of the Interior, tribes will be able to regulate and distribute waters among the people on the various reservations.
>
> This will give us a counterpart to the State procedures for filing of water rights and uses and will keep the States from trying to regulate our waters. This is what we want and we encourage this effort.
>
> We understand that there will be proposed a bill to grant Indian water rights jurisdiction exclusively into the Federal court system and keep us out of State tribunals.
>
> This we badly need, as you can see what is happening to the Southern Ute and Ute Mountain cases, which are threatened to end up in a very unfriendly State court.

This witness also had some highly illuminating remarks to make concerning the report of the National Water Commission of which so much is made by the government (Br. 56-57) and the Indian amici (Br. 34). He noted that the Indians had tremendous objections to the Commission's draft report, and that the Commission after being severely criticized, relented and treated Indians in a separate chapter in the final report. Still however, he said Indians had serious problems with the Commission's report and that before any legislation or action were generated by the report Con-

[48] Among amici in this case.

[49] Hearings, *supra* fn. 47, at 5. It may be noted the state does not control the distribution of water below the point of diversion.

gress should hold hearings on it both in the field and in Washington.[50]

Another witness said:[51]

> The Congress, courts, and the States should not equate "Federal waters" with "Indian waters," as they are not the same. The failure to distinguish "Federal waters" from "Indian waters" has resulted in the loss of water rights jurisdiction in the Federal court for the Ute Tribes in Colorado in *United States* v. *Akin*, based on language in *United States* v. *District Court in and for the County of Eagle*. This case should be declared unconstitutional for the citizens of this country have not terminated the power granted to Congress to deal with Indians under the Commerce clause which I already mentioned in this testimony.

And further:[52]

> Once the Indian tribes are brought into State courts or, for that matter, even if they are brought into Federal courts, the attempt is to apply the State doctrine of prior appropriation which simply means, in my opinion, the historical use of water without allowing Indians to plan for the future use of water for increased domestic use demands, commercial and industrial uses, including agriculture, as provided under the Winters doctrine.

While it was thus apparent in these hearings that the Indians did not want water rights adjudicated in state courts, it was also clear they did not want the federal courts applying customary law either and that recom-

[50] *Id.* at pp. 5-6. See also pp. 47, 52.

[51] *Id.* at 46.

[52] *Id.* at 47.

mendations in that regard by the National Water Commission should not receive immediate action. As in the previous hearings they sought legislation ". . . to stop the stealing of Indian waters and assure the proper litigation and adjudication of Indian water rights in Federal courts."[53] Congress, however, has not acted on these suggestions.

C. Public Law 280 did not repeal the McCarran Amendment

Despite the foregoing history the government contends that waiver of immunity in McCarran was only partial as a consequence of the Act of August 15, 1953 (P.L. 280),[54] and particularly that portion codified as 28 U.S.C. 1360, which contains *inter alia* certain limitations on civil jurisdiction granted five states in actions to which Indians are parties (Br. 58). Since there is no specific reference to 43 U.S.C. 666 in P.L. 280, this contention in effect calls for repeal of McCarran by implication as far as claims of the United States on behalf of Indians are concerned. This flies in the face of the rule against such a result[55] and is wholly at odds with the clear purpose of McCarran to bring all claims to water into one proceeding.

A review of P.L. 280 shows that on its face it is inapplicable here. Sec. 1360 applies to causes of action "between Indians or to which Indians are parties" arising on Indian reservations in five specific states, not including Colorado. None of those factors are pres-

[53] *Id.* at 48.

[54] Public Law 83-280, 67 Stat. 588, partially codified as 18 U.S.C. 1162 and 28 U.S.C. 1360, as amended in 1968, 25 U.S.C. 1321-1326.

[55] *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974).

ent. The state proceeding is ongoing under Colorado's Water Rights Determination and Administration Act of 1969, involving the use of waters within Water Division 7, and the United States is a party. In the federal proceeding, the United States is a party advancing many claims, including those on behalf of the Indians but no Indians have appeared as parties. The interests of the state and its citizens in determining and administering water rights, which led to the state proceeding, can hardly be characterized as providing a "cause of action" arising on the reservations for which the government makes claims.

Moreover, Colorado is not one of the five states enumerated in P.L. 280. Colorado has no disclaimer of jurisdiction over Indian matters in its Constitution or Enabling Act; instead, its jurisdiction in certain matters involving Indians, their reservations and property has been recognized. This Court noted in *U.S.* v. *McBratney,* 104 U.S. 621, 623, 624 (1881), a criminal proceeding involving non-Indians on the Ute Reservation:[56]

> . . . the Act of Congress of March 3, 1875, for the admission of Colorado into the Union, authorized the inhabitants of the Territory "To form for themselves out of said Territory a State government, with the name of the State of Colorado, which State, when formed, shall be admitted into the Union upon an equal footing with the original States in all respects whatsoever"; and the Act contains no exception of the Ute Reservation, or of jurisdiction over it.
>
> . . . that [Ute] reservation is no longer within the sole and exclusive jurisdiction of the United States.

[56] See also *Draper* v. *U.S.,* 164 U.S. 240 (1896).

And the Colorado Supreme Court has specifically recognized state court jurisdiction over an action against the Southern Ute Indian tribe by an Indian claiming to have been wrongfully expelled therefrom. In *Martinez* v. *Southern Ute Tribe,* 150 Colo. 504, 374 P.2d 691 (1962), the court noted that the courts of Colorado shall be open to every person and that the tribe by incorporating under federal law had consented to sue and be sued in courts of competent jurisdiction within the United States. Thus, the tribe "has rendered itself amenable to the courts of the State of Colorado in any action of which the state courts may take cognizance." 150 Colo. at 510. See also, *Martinez* v. *Southern Ute Tribe,* 249 F.2d 915 (10th Cir. 1957), cert. denied 356 U.S. 960 (1958).

The legislative history shows that P.L. 280 was concerned principally with the enforcement of law and order on reservations.[57] The civil jurisdiction provisions were added rather belatedly, apparently in furtherance of the termination policy, without any real exposition in the legislative history, save for the express Congressional determination to make the Indians subject "to the same laws and entitled to the same privileges and responsibilities" as other citizens.[58] Were there any history available to support the argument that P.L. 280 bars the applicability of McCarran

[57] This history is reviewed in "Background Report on Public Law 280" prepared at the request of Senator Jackson as Chairman of the Senate Committee on Interior and Insular Affairs, Committee Print, 94th Cong., 1st Sess. (1975). On "law and order" see e.g. 15, 23. S. 2010, supported by Indian groups at hearings held by the Senate Interior Committee on December 3-4, 1975, would repeal P.L. 280 and a variety of related statutes.

[58] *Id.* at 10 for quotation from H. Con. Res. 108, 83d Cong., 1st Sess. (1953).

it doubtless would have been used in the discussion of P.L. 280 in a recent treatise prepared for the Department of Interior. There is no mention there however and indeed elsewhere that document notes:[59]

> The March 24, 1971 Supreme Court decision on the Eagle River case (Colorado) held that Indian water rights are subject to adjudication in State courts under certain circumstances, but if there is conflict between Federal rights (including Indian rights) and State court action, the Supreme Court can take the case for review.[4]
>
> Although the tribes continue to possess the priorities they have always had non-Indians may institute water suits that will require court defense by tribes.[5]

In addition, the government's arguments here under P.L. 280 have been made as well to the U.S. District Court in New Mexico in water litigation involving § 666 and claims on behalf of Indians on the San Juan River in New Mexico. While that court did not rule specifically on the P.L. 280 argument, it remanded to the state court, holding:[60]

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[59] Taylor, *The States and Their Indian Citizens*, U.S. Department of Interior, Bureau of Indian Affairs (1972) at pp. 116-18, footnotes omitted. It should be noted that this treatise was specifically directed at giving special attention to Indian, local and state governmental relationships as well as the role of the Federal Government. See Foreword.

[60] *New Mexico ex rel. Reynolds* v. *U.S. et al.*, No. 75-199M Civil, U.S. D.C., N. Mex., October 23, 1975 (unreported). The court's order is contained in Exhibit 3 hereto. In addition to the state proceedings in New Mexico, counsel for amici states advise water rights held by or on behalf of Indians have been adjudicated or otherwise administered by state forums *e.g.* in Utah through applications for the Ute-Ouray Indian Reservation; in Montana for the Northern Cheyenne in the *Miles City* proceeding, Cause No. 2809, Custer County (1914); in California in the North Fork Pit River Decree (Pit River Indians), Modoc County Court No. 4074 (1939); Shackelford Creek Decree (Quartz Valley Indian Res.), Siskiyou County Court No. 13775 (1950); Bidwell Creek Decree

> The United States was properly before the State Court pursuant to 43 U.S.C. 666 in its capacity as trustee over Indian lands, *Arizona* v. *California*, 373 US 546; *United States* v. *Akin*, 504 F.2d 115 (10th Cir. 1974) (where the United States brought the action as Plaintiff on behalf of two Indian tribes); and *United States* v. *District Court of Eagle County*, 401 US 520. The right of removal which the United States seeks to exercise is not implicit in 43 U.S.C. 666, nor in the mere fact that the United States is a defendant.

In addition to the reasons already given for the specific inapplicability of P.L. 280 here, this Court has recognized that ". . . notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating non-Indians," *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 171 (1973) referring in this regard to the Court's landmark decision in *Williams* v. *Lee*, 358 U.S. 217 (1959). There, while finding that the state did not have jurisdiction, the Court reviewed modifications of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) ". . . in cases where essential tribal relations were not involved and where the rights of the Indians would not be jeopardized, . . ." (*Williams, supra* at 219). This test, applicable principally to situations involving non-Indians (*McClanahan* at 179), is ideally suited to the present case, for here we have some 1,000 named parties, as well as unnamed others, having claims which will be affected by those urged by the United States, including those urged on behalf of Indians.

(Fort Bidwell Indian Res.), Modoc County Court No. 6420 (1960). Among state cases holding P.L. 280 not the exclusive means by which state jurisdiction is exercised see *State ex rel. Iron Bear* v. *District Court*, 162 Mont. 335, 512 P.2d 1292 (1973), *State* v. *Warner*, 71 N.M. 418, 379 P.2d 66 (1963), *Anderson* v. *Britton*, 212 Ore. 1, 318 P.2d 291 (1957).

In a "monumental" work on Indian law[61] it is stated:

> . . . [S]tate jurisdiction in any matters affecting Indians can be upheld only if one of two conditions is met: either that Congress has expressly delegated back to the state, or recognized in the state, some power of government respecting Indians; or that a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of a state government.

These pre-P.L. 280 criteria are substantially the same as laid down by this Court in *Williams* and *McClanahan supra*. See also *Orangized Village of Kake* v. *Egan*, 369 U.S. 60 (1962). In our view the criteria are clearly met here, for McCarran plainly covers all claims of the United States, including those for Indians, and non-Indians are involved in a way necessitating state jurisdiction.

There is thus room for both statutes and no need ". . . to pick and choose among congressional enactments . . ." which the Court inveighed against in *Morton* v. *Mancari*, 417 U.S. at 551, citing the duty to regard each of the enactments effective absent a clear congressional intention to the contrary. This is not a suit on a debt arising on a reservation as in *Kennerly* v. *District Court*, 400 U.S. 423 (1971) and *Williams* v. *Lee*, *supra*, nor does it involve a personal tax as in *McClanahan*, *supra*, all of which found the protection of P.L. 280. This proceeding goes well beyond internal reservation concerns, to the borders of Water Division 7 and all of the property within it.

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[61] *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), separate opinion at 159, referring to *Handbook of Federal Indian Law* by Felix S. Cohen (1942). See p. 117.

CONCLUSION

Contrary to the assertion of the government there are really no "different legal and historical principles" (Br. 61) involved here as to the scope of McCarran, whether the claim be for the use of water on Indian or non-Indian federal property. Congress, in dealing with an essential resource, went far beyond particular federal claims such as for farmers, Indian or non-Indian, on reclamation projects or for other uses; or for municipalities for domestic supplies; or for parks; or recreation; or monuments. It dealt with certainty in the use of this resource, and as this Court said in *Eagle* and *Water Division 5*, left no room for exceptions because the totality of claims was included. Accordingly, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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January 1976

APPENDIX

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 2491

IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE USE OF THE WATERS OF CHILIWIST CREEK AND ITS TRIBUTARIES IN OKANOGAN COUNTY, WASHINGTON, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 90.03 REVISED CODE OF THE STATE OF WASHINGTON

M. G. WALKER, AS SUPERVISOR OF WATER RESOURCES FOR THE STATE OF WASHINGTON, *Plaintiff*

v.

BILES-COLEMAN LUMBER COMPANY, et al., *Defendants*

Opinion

This is a water rights adjudication case. It was filed in the Superior Court of the State of Washington for Okanogan County under R.C.W. 90.03. The United States and Theophile B. Charley, an Indian allottee, were named as defendants. State process was issued and served.

The United States filed its petition to remove to this Court and has filed a motion to dismiss here. It urges that the Superior Court had no jurisdiction and therefore the case should be dismissed. This is because this Court's jurisdiction is derivative. If the state court had no original jurisdiction this Court on removal has none. Plaintiff moves to remand.

The statute under which the plaintiff claims the right to sue the United States and an Indian allottee is 43 U.S.C.A. 666. It contains the following:

"The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, • • •."

I agree with Judge Christensen in *In Re Green River Drainage Area,* 147 F. Supp. 127 (1956). This statute is a waiver of sovereign immunity in a water rights case. It is my opinion that the motion to remand should be granted. The motion to dismiss may be passed on by the Superior Court. Plaintiff is requested to submit an order so providing.

DONE BY THE COURT this 29 day of May, 1964.

CHARLES L. POWELL
United States District Judge

• • •

EXHIBIT 2

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR OKANOGAN COUNTY

No. 16323

IN THE MATTER OF THE DETERMINATION OF THE RIGHTS TO THE USE OF THE WATERS OF CHILIWIST CREEK AND ITS TRIBUTARIES IN OKANOGAN COUNTY, WASHINGTON, IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 90.03 REVISED CODE OF THE STATE OF WASHINGTON

M. G. WALKER, AS SUPERVISOR OF WATER RESOURCES FOR THE STATE OF WASHINGTON, *Plaintiff*

v.

BILES-COLEMAN LUMBER COMPANY, et al., *Defendants*

Decree

This cause having heretofore come on regularly before the court for hearing on the 18th day of October, 1966 upon the report of the referee, M. G. Walker, plaintiff herein, dated the 19th day of August, 1966, pursuant to notice duly given as required by law, the plaintiff appearing by its attorneys, John J. O'Connell.

• • •

And the parties, excepting the defendant, State of Washington, Department of Natural Resources, having stipulated with plaintiff in open court with regard to modifications of said report that they have withdrawn their exceptions to the report of the referee based on said modifications being made to the referee's report as hereinafter incorporated in this decree, and the court having considered the oral arguments and briefs for and against the exception of the defendant, State of Washington, Department of Natural Resources, and it appearing to the

court from the records and files in this cause that all the defendants have been duly and regularly served, either personally or by publication, with summons in all respects according to law, and the default of the defendants not appearing having been previously ordered by this court, and the court being fully advised in the law and premises:

Now, Therefore, it is by the court Ordered, Adjudged and Decreed:

1. That the exception filed herein by the defendant, State of Washington, Department of Natural Resources, to the report of the referee is sustained and water rights granted to said defendant as set forth in section 5 hereof.

2. That the report of the referee herein is hereby in all things approved and confirmed and adopted, except as in this decree is specifically modified based on stipulations of the parties made in open court, and section 5 hereof.

3. That the party defendants hereto and their successors in interest to the lands after each respective name in the schedule of rights hereinafter set forth be and they are hereby decreed to be entitled to divert the waters of Chiliwist Creek and its tributaries in Okanogan County, Washington, for beneficial use or in connection with their respective lands herein mentioned; that the rights and priorities in and to the use of said water be and they are hereby adjudged and determined to be as set forth in said schedule.

4. That the schedule of rights setting forth the classification and priority for which rights have been established, claimant's name, claim number, number of acres, amount of water, uses, source, point or points of diversion and appurtenant lands are as follows:

A.

Claimant and Number	Number of Acres	Amount of Water Cubic Feet Per Second	Use	Source
CLASS 1—1865				
Theophile B. Charley, et ux				
3	59	0.75	Irrigation stock and domestic	Lower Chiliwist Creek
Point of Diversion:			SE¼SE¼ Sec. 18, T. 32 N., R. 25 E.W.M.	
Appurtenant Lands:			Government Lots 6 and 7, NE¼NE¼ Sec. 19, T. 32 N., R. 25 E.W.M. Government Lots 1 and 2, Sec. 20, T. 32 N., R. 25 E.W.M.	
CLASS 2—1893				
James E. and Gertrude Stout Vern L. and Frances L. Cox Connecticut Mutual Life Insurance Company				
1	55	0.91	Irrigation, stock and domestic	Middle Chiliwist Creek
Point of Diversion:			NE¼NE¼ Sec. 14, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			S½NW¼, NW¼NW¼ Sec. 13, T. 32 N., R. 24 E.W.M. W½W½ Sec. 12, T. 32 N., R. 24 E.W.M.	
Paul and Eula E. Stout				
5	69	1.22	Irrigation, stock and domestic	Middle Chiliwist Creek
Point of Diversion:			NE¼SW¼ and NW¼SE¼ Sec. 13, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			S½NE¼, NE¼SW¼, SE¼ Sec. 13, T. 32 N., R. 24 E.W.M.	

Claimant and Number	Number of Acres	Amount of Water Cubic Feet Per Second	Use	Source
CLASS 3—1900				
PAUL and EULA STOUT				
5	7	0.14	Irrigation, stock and domestic	Middle Chiliwist Creek
Point of Diversion:			SW¼NW¼ Sec. 14, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			S½NW¼ Sec. 14, T. 32 N., R. 24 E.W.M.	
BEULAH LILLIAN HILDERBRAND				
2	—	0.01	Stock and domestic	Upper Chiliwist Creek
Diversion Point:			SW¼SW¼ Sec. 32, T. 33 N., R. 24 E.W.M.	
Appurtenant Lands:			SW¼, W½SE¼, SE¼SE¼ Sec. 32, T. 33 N., R. 24 E.W.M.	
HERBERT L. POOLE and MARILEN D. POOLE ROBERT KERCHEVAL and LUCILLE KERCHEVAL				
7	80	1.60	Irrigation, stock and domestic	Upper Chiliwist Creek
Point of Diversion:			NW¼ Sec. 10, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			NW¼, NW¼NE¼, S½ Sec. 10, T. 32 N., R. 24 E.W.M.; N½ Sec. 15, T. 32 N., R. 24 E.W.M.	
A. E. and ZELMA LOCKWOOD				
6	8	0.16	Irrigation	Spring in NW¼ SW¼ Sec 13, T. 32 N., R. 24 E.W.M.
Point of Diversion:			NW¼SW¼ Sec. 13, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			N½NW¼SW¼ Sec. 13, T. 32 N., R. 24 E.W.M.	

Claimant and Number	Number of Acres	Amount of Water Cubic Feet Per Second	Use	Source
CLASS 4—1905				
LESLIE M. and LOIS MEYERS				
4	7	0.13	Irrigation, domestic and stockwater	Lower Chiliwist Creek
Point of Diversion:			Lot 3, Sec. 17, T. 32 N., R. 25 E.W.M.	
Appurtenant Lands:			Lots 3 and 4, Sec. 17, 32 N., R. 25 E.W.M.; E½SE¼ Sec. 18, T. 32 N., R. 25 E.W.M.	
JAMES E. and GERTRUDE STOUT, ET AL				
1	35	0.59	Irrigation	Middle Chiliwist Creek
Point of Diversion:			NE¼SE¼ Sec. 13, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			Government Lot 4, SW¼SE¼, S½SE¼SW¼ Sec. 18, T. 32 N., R. 25 E.W.M.	
UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE				
10	—	0.01	Stockwater and domestic supply	Upper Chiliwist Creek and tributaries
Points of Diversion:			N½SE¼ Sec. 12, T. 33 N., R. 23 E.W.M.; SE¼SW¼ Sec. 13, T. 33 N., R. 23 E.W.M. NE¼NE¼ Sec. 24, T. 33 N., R. 23 E.W.M.	
Appurtenant Lands:			NE¼SW¼, SE¼ Sec. 12; all of Sec. 13; SE½NE¼ Sec. 14; NE¼ Sec. 23; all of Sec. 24; E½ Sec. 25; E½ Sec. 36 all in T. 33 N., R. 23 E.W.M., E½ Sec. 1, T. 32 N., R. 23 E.W.M., W½ Sec. 30; W½ Sec. 31 all in T. 33 N., R. 24 E.W.M.	

Claimant and Number	Number of Acres	Amount of Water Cubic Feet Per Second	Use	Source
WILLIAM H. and ELINOR L. HARMS GEORGE E. and EVELYN HARMS				
14	—	0.01	Stockwater and domestic supply	Upper Chiliwist Creek
Point of Diversion:			At southeast corner of the SE¼, Sec. 4, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			South 60 rods of S½SW¼ Sec. 4; NW¼, SE¼, SE¼SW¼ Sec. 9; all that part of W¼ Sec. 10 lying west of county road; all in T. 32 N., R. 24 E.W.M.	
CLASS 5—1906				
JAMES E. and GERTRUDE STOUT, ET AL				
1	60	1.0	Irrigation and stockwater	Sullivan Creek
Point of Diversion:			SE¼NW¼ Sec. 3, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			SE¼NW¼ and E½SW¼ Sec. 3, T. 32 N., R. 24 E.W.M.	

This right is not subject to the prior rights of classes 1 through 4 hereof on the main stem of Chiliwist Creek below the confluence of Sullivan Creek and the main stem at such times as Sullivan Creek does not contribute surface waters naturally to the flow of Chiliwist Creek.

N. M. and KATE W. DELFELD DONALD W. and BILLIE L. DELFELD				
11	—	0.01	Stockwater and domestic supply	Frazier Canyon Creek and Smith Canyon Creek
Point of Diversion:			SW¼SW¼ Sec. 35, T. 33 N., R. 24 E.W.M.	
Appurtenant Lands:			Government Lot 4, S½NW¼, SW¼ Sec. 1; N½, N½SW¼ Sec. 2; Government Lot 1, SE¼NE¼, NE¼SE¼ Sec. 3; all in T. 32 N., R. 24 E.W.M. SW¼SW¼ Sec. 26; SE¼SE¼, East ¾ SW¼SE¼ Sec. 34; Sec. 35; all in T. 33 N., R. 24 E.W.M.	

Claimant and Number	Number of Acres	Amount of Water Cubic Feet Per Second	Use	Source
CLASS 6—1914				
A. E. and ZELMA LOCKWOOD				
6	3	0.035	Irrigation, stockwater, domestic	Springs tributary to Middle Chiliwist Creek
Point of Diversion:			SE¼NE¼ Sec. 14, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			SE¼NE¼, NE¼SE¼ Sec. 14, T. 32 N., R. 24 E.W.M.	

Note: By virtue of Decree, Cause No. 8897 of this Court, this right is superior to the Class 2 right of Claim No. 1, James E. Stout, et al.

CLASS 7—1917				
CHILIWIST CATTLEMEN'S ASSOCIATION				
12	—	0.01	Stockwater	Springs tributary to Frazier Canyon Creek
Point of Diversion:			NE¼ Sec. 34, T. 33 N., R. 24 E.W.M.	
Appurtenant Lands:			NE¼ Sec. 34, T. 33 N., R. 24 E.W.M.; SW¼NE¼, NW¼SE¼ Sec. 33, T. 33 N., R. 24 E.W.M.	
CLASS 8—1953				
JAMES E. STOUT, ET AL				
1	82	2.0	Irrigation	Sullivan Creek
Point of Diversion:			SE¼NE¼ Sec. 33, T. 33 N., R. 24 E.W.M.	
Appurtenant Lands:			E½SW¼, SE¼NW¼ Sec. 3, T. 32 N., R. 24 E.W.M.; NW¼SW¼ Sec. 34, T. 33 N., R. 24 E.W.M.; NE¼SE¼, E½NE¼ Sec. 33, T. 33 N., 24 E.W.M.	

Note: This right by virtue of water right Certificate No. 6156 and partially supplements claimant's right under Class 5. Diversion is limited to months of March through June and is subject to the provision that sufficient water be bypassed to satisfy downstream riparian owners with stockwater.

Claimant and Number	Number of Acres	Amount of Water Cubic Feet Per Second	Use	Source
		CLASS 9—1955		
JAMES E. STOUT, ET AL				
1	118	2.10	Irrigation	Smith Canyon and Middle Chiliwist Creeks
Points of Diversion:			NE¼NE¼ Sec. 14, T. 32 N., R. 24 E.W.M. and NE¼SE¼ Sec. 13, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			N½NE¼, SE¼NE¼, NE¼SE¼ Sec. 11, T. 32 N., R. 24 E.W.M.; W½SW¼, SW¼NW¼ Sec. 12, T. 32 N., R. 24 E.W.M.; S½NW¼, NW¼NW¼ Sec. 13, T. 32 N., R. 24 E.W.M.; Government Lot 4, SW¼SE¼, S½SE¼SW¼ Sec. 18, T. 32 N., R. 25 E.W.M.; Government Lot 1, NW¼NE¼, NE¼NW¼ Sec. 19, T. 32 N., R. 25 E.W.M.	
Note: This right by virtue of water right Certificate No. 7147 which supplements earlier class rights for Claimant No. 1.				
PAUL and EULA E. STOUT				
5	91	1.62	Irrigation	Middle Chiliwist Creek
Points of Diversion:			NE¼SW¼ and NW¼SE¼ Sec. 13, T. 32 N., R. 24 E.W.M.; SW¼NW¼ Sec. 14, T. 32 N., R. 24 E.W.M.	
Appurtenant Lands:			S½NE¼ NE¼SW¼, SE¼ Sec. 13, T. 32 N., R. 24 E.W.M.; S½NW¼ Sec. 14, T. 32 N., R. 24 E.W.M.	
Note: This right by virtue of water right Certificate No. 6733 and supplements Claimants' Class 2 and 3 rights as well as to include 22 additional acres of land not previously irrigated.				

B. Claimant Number 10, United States of America, as the owner of the lands of the Okanogan National Forest, has submitted claims for water rights and proof related thereto based on two sources: (1) Rights based on the law of the State of Washington and (2) Rights "reserved" by the United States of America for use in relation to lands within the Chiliwist Creek drainage of the Okanogan National Forest. See generally *Winters* v. *United States,* 207 U.S. 564 (1908) and *Arizona* v. *California,* 373 U.S. 546 (1963).

With regard to rights established under the law of the State of Washington, the claimant is entitled to 0.01 cubic foot per second for stockwater and domestic purposes with a priority date of 1905, as set forth in the schedule of this report.

As to the so-called "reserved" rights, the claimant, based on the scope of the forest reservation as set forth in the Proclamations of the President of the United States establishing the Okanogan National Forest, and taking into account the quality of the soils, the natural flora and fauna and the topography of the lands in question, the climatic conditions, and past and present uses of the lands, is entitled with a priority date of 1897 to make use of the waters of Chiliwist Creek now and in the future in amounts reasonably necessary and sufficient to carry out the limited purposes for which the forest reserve lands were reserved; namely, timber management and production and related purposes including fish and wildlife management, livestock grazing, and recreational activities.

C. When the supply of water for irrigation purposes is insufficient to fill any right in the foregoing schedule from April 1 to October 1, the owner of such right is entitled to divert water in the order of his priority at the rate of 1 cubic foot per second for each 60 acres at any time it is available after all scheduled rights are filled, to the extent of a volume of 4 acre-feet per acre per year.

D. Irrigation from April 1 to October 1 shall not exceed 1.0 cubic foot per second for each 60 acres and shall not exceed a total of 4 acre-feet per acre will be diverted for the same period.

E. This allotment of water is subject to a rotation schedule fixed by the Supervisor or by the water master for the districts involved, when it is deemed advisable to rotate the use of water in order to obtain a greater benefit from the available supply.

F. When the flow from Chiliwist Creek and its tributaries is insufficient to supply all classes, rights of a higher class shall be fully satisfied before water is given to those of a subordinate class, and in case of failure of the supply of water to completely satisfy the total amount awarded to a given class, the amount remaining for said class shall be apportioned to the appropriators in said class in the proportion which the number of cubic feet per second awarded to each person bears to the total number of cubic feet per second awarded such class, subject to use by rotation. A superior right does not run against inferior rights on other tributaries that enter the stream below the point of diversion of said superior right. Any person taking water from Chiliwist Creek and its tributaries, shall provide and maintain at his own expense proper diversion works and measuring devices as are required by statute under RCW 90.03.360.

G. Subject to the rights set forth in this decree, all waters of Chiliwist Creek and its tributaries are subject to appropriation by the public, or reservation by the United States.

5. That the Department of Natural Resources, State of Washington, defendant herein, as owner of lands riparian to Chiliwist Creek is entitled, with a priority date as hereinafter set forth, to a continued right of flow in said stream in the amount of 0.025 cubic feet per second for stock water

watering purposes for livestock utilizing for pasture the following described lands:

* * *

6. That the clerk of the above-entitled court be and is hereby directed to transmit to the plaintiff, Supervisor of Water Resources, a certified copy of this decree.

7. That upon receipt of such certified copy, the plaintiff, Supervisor of Water Resources, shall prepare and file with the clerk of the above-entitled court a statement by him in this determination, showing the total expense by him in his determination, and apportioning such expense to the various rights as determined by the court in this decree in proportion to the amount of such rights provided that no costs or expenses shall be assessed to the United States of America or Theophile B. Charley, et ux.

8. That the plaintiff, Supervisor of Water Resources, is hereby directed to issue to the persons entitled thereto certification of water in accordance with the provisions of this decree, as provided in RCW 90.03.240, provided said persons shall have first paid the amount of expenses apportioned against their lands as provided in section 7 of this decree.

Done in open court this 16th day of May, 1967.

* * *

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 75-199M Civil

STATE OF NEW MEXICO, ex rel.,
S. E. REYNOLDS, State Engineer, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, et al., *Defendants*.

Order

This case involves a New Mexico adjudication of water rights to which the United States was joined as a defendant to establish its claims on behalf of various federal agencies and as trustee over Indian lands using or claiming water of the San Juan River.

The United States removed the case here and the plaintiff moved to remand the action to the District Court for San Juan County. The motion to remand is well taken.

The United States was properly before the State Court pursuant to 43 U.S.C. 666 in its capacity as trustee over Indian lands, *Arizona* v. *California*, 373 US 546; *United States* v. *Akin*, 504 F.2d 115 (10th Cir. 1974) (where the United States brought the action as Plaintiff on behalf of two Indian tribes); and *United States* v. *District Court for Eagle County*, 1101 US 520. The right of removal which the United States seeks to exercise is not implicit in 43 U.S.C. 666, nor in the mere fact that the United States is a defendant.

There is presently no federal question jurisdiction and the removal cannot be sustained under 1441(c). Section 1442 also is not available. *In re Green River Drainage*

Area, 147 F.Supp. 127 (DC Utah 1956); *Andersen* v. *Bingham & G. Ry. Co.*, 169 F.2d (10th Cir. 1948). Now, Therefore,

IT IS ORDERED that the action is remanded to the District Court for San Juan County, New Mexico.

EDWIN L. MECHEM
United States District Judge